IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
March 20, 2008 Session

THOMAS BUILDERS, INC. v. SHAILESH PATEL, ET AL.

Appeal from the Chancery Court for Knox County
No. 166196-1 John F. Weaver, Chancellor

No. E2007-01184-COA-R3-CV - FILED JULY 31, 2008

Thomas Builders, Inc. sued Shailesh Patel and his LLC, alleging that Mr. Patel breached a construction contract. The parties had been in negotiations to build a hotel in downtown Knoxville. Thomas Builders' president, Darrell Thomas, claims that he and Mr. Patel agreed to a binding contract; Mr. Patel claims that no contract was ever made. At a bench trial, Mr. Patel testified that Mr. Thomas asked him to sign the purported contract as an "indication that I am really serious to continue discussions." This testimony was not directly rebutted. At the conclusion of the trial, the trial court stated that it believed Mr. Patel's testimony, and held that there was no breach. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Timothy W. Burrow, Nashville, Tennessee, for the appellant, Thomas Builders, Inc.

Michael P. Sayne, Knoxville, Tennessee, for the appellees, Shailesh Patel and Sachichidanand Lodging, LLC.

OPINION

Thomas Builders is a construction company that specializes in building hotels. Shailesh Patel is a businessman who, through various entities, owns several hotels.[1] Starting in 2000, Mr. Patel began looking at the possibility of opening a Hampton Inn and Suites in downtown Knoxville. He had discussions with various contractors, including Thomas Builders, about possible plans for building the hotel. In 2003, Thomas Builders submitted a proposal to Mr. Patel to build the hotel

[1] The hotel at issue in the instant case is owned by Sachichidanand Lodging, LLC, which was created in 2001 for the purpose of building and owning this hotel. Mr. Patel is the chief manager of the LLC, and is the sole individual who acts on its behalf. The LLC was also sued in this case.

for $3.2 million. The document, titled "PROPOSAL," contained approximately four-and-one-half pages of printed specifications for the potential hotel, as well as three pages of hand-sketched drawings. The final paragraph of the specifications letter states, "Thank you for the opportunity to quote this project." There is no signature line or explicit contractual language in the proposal.

On April 22, 2003, after a telephone conversation with Mr. Thomas, Mr. Patel signed his name at the bottom of the specifications letter of the proposal, and he wrote the word "Accepted" next to his signature. However, Mr. Patel ultimately selected a different contractor, who built the hotel. Thomas Builders claims that this constitutes a breach of contract. Mr. Patel argues that no contract existed; he never agreed, he says, to hire Thomas Builders as his contractor.

In its memorandum opinion, the trial court summarized the pertinent facts as follows:

> On April 21, 2003, Mr. Thomas submitted a revised proposal to Mr. Patel for construction of a hotel for six stories and 85 rooms. After sending the revised proposal, Mr. Thomas telephoned Mr. Patel.
>
> The dispute between these parties begins with the telephone conversation of Mr. Thomas and Mr. Patel.
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> Mr. Thomas testified that he told Mr. Patel that there was another project in North Carolina that he thought that he could get but that he did not want to construct both that project and Mr. Patel's project. Mr. Thomas testified that he told Mr. Patel that if he would sign the proposal, then Mr. Thomas would let the North Carolina project go.
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> On the other hand, Mr. Patel testified that Mr. Thomas telephoned him and *said that he needed Mr. Patel to sign the proposal just so that Mr. Thomas could have something to show others in Thomas Builders that Mr. Patel was serious about continuing discussions*.
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> Mr. Patel testified that *he told Mr. Thomas that he was signing the proposal for discussion purposes only* and, furthermore, that the bank would have to approve the contract and that additional land would have to be purchased. Later in Mr. Patel's testimony, he stated that he also emphasized that a full set of plans was needed.
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> Mr. Patel wrote upon the proposal, "Subject to bank approval and closing on 608 Main Street" – and there is a hyphen and the word "accepted" . . . and then there is a hyphen, "Shailesh Patel, 4/23/03." And then the telephone number of (865) 405-9999.
>
> Mr. Thomas testified that upon receipt of the proposal with Mr. Patel's handwritten words and signature, Mr. Thomas was of the opinion that the parties had entered into a contract.

> Conversely, Mr. Patel testified that he was of the opinion that the parties had not entered into a contract considering that the discussion that Mr. Patel's signing of the proposal was for discussion only, and considering that no plans existed from which the construction could be determined.
>
> The proposal had attached to it only the hand-drawn sketches of floor plans furnished by Mr. Patel as well as the one sheet of basic information furnished by Mr. Patel. The one sheet of information referred to the original plans dated September 8, 2002, but added that the plans were "to be modified accordingly."
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> *Mr. Patel's version of the conversation concerning his signing of the proposal for discussion purposes only is without specific rebuttal*, although Mr. Thomas testified that he was of the impression that the parties had a contract.
>
> *This Court believes Mr. Patel's version that Mr. Thomas knew that Mr. Patel did not intend to be bound by a contract via his signing the proposal.*
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> * * *
>
> In this case, the original offeror, *Thomas Builders, had reason to know that there was no contract, that Mr. Patel had no intent to be bound by a contract. Mr. Thomas induced Mr. Patel's signature with the understanding that Mr. Patel's signature would only indicate that Mr. Patel was serious about continuing discussions*.

(Emphasis added.)

Because this case was tried by the court without a jury, our review is *de novo* upon the record of the proceedings below, with a presumption of correctness as to the trial court's findings of fact. *See* Tenn. R. App. P. 13(d). The judgment of the trial court should be affirmed, absent errors of law, unless the preponderance of the evidence is against those findings. ***Bogan v. Bogan***, 60 S.W.3d 721, 727 (Tenn. 2001). The trial court's conclusions of law are reviewed *de novo* with no presumption of correctness. ***Langschmidt v. Langschmidt***, 81 S.W.3d 741, 744-45 (Tenn. 2002).

As can be seen, the court's primary holding is that Mr. Patel's signature on the Thomas Builders' proposal was of no legal effect, because Mr. Thomas "induced" him to sign it "for discussion purposes only." If this underlying factual determination is accurate, the court's legal conclusion is consistent with the well-settled principle that "the existence of a contract, the meeting of the minds, the intention to assume an obligation, and the understanding are to be determined in case of doubt not alone from the words used, but also the situation, acts, and the conduct of the

parties, and the attendant circumstances." ***Gurley v. King***, 183 S.W.3d 30, 43 (Tenn. Ct. App. 2005) (*quoting* 17 Am.Jur.2d *Contracts* § 1 (1964)).

In the alternative, the trial court held that, if Mr. Patel's signature had any legal effect, it constituted either a counter-offer – which Thomas Builders did not accept prior to its revocation – or an acceptance in escrow, which Mr. Patel lawfully withdrew prior to the conditions being met. In either case, the court held, there was no contract. The court further stated that, regardless of the issues related to offer and acceptance, the purported contract lacked the essential terms necessary to render it valid and enforceable. Therefore, again, no binding contract was formed. Finally, the court *also* held, in yet another alternative holding, that *even if* a contract was formed, Thomas Builders did not prove damages. Several of Thomas Builders' issues on appeal relate exclusively to these alternative holdings.[2] As will be seen, however, we need not reach these matters, because we uphold the court's primary holding, which pretermits nearly all other issues in the case.

The content of the phone conversation between Mr. Patel and Mr. Thomas that accompanied Mr. Patel's signing of the proposal raises a threshold question, which is ultimately the dispositive issue in this case. If, as the court declared in its primary holding, "Mr. Thomas induced Mr. Patel's signature" by telling him that the signature "would only indicate that Mr. Patel was serious about continuing discussions," then it follows necessarily that Mr. Patel's signature was not an acceptance of an offer by Thomas Builders. Indeed, on these facts, Mr. Thomas was not even *making* an offer; asking someone to sign a "proposal" in order to prove his "seriousness" is not the same thing as making a contractual offer to build a hotel.[3] And if Mr. Patel's signature was not given in response to an offer, it cannot have been an acceptance, nor a counter-offer, nor an acceptance in escrow. In short, if the trial court's interpretation of the facts surrounding the parties' conversation is correct, there cannot have been a binding contact under any theory, and thus Thomas Builders' claim for breach of contract much fail. "The legal mechanism by which parties show their assent to be bound is through offer and acceptance." ***Moody Realty Co., Inc. v. Huestis***, 237 S.W.3d 666, 675 n.8 (Tenn. Ct. App. 2007). The only remaining issue then is the estoppel claim, which we will address briefly at the end of this opinion.

With regard to the dispositive factual issues, Mr. Patel testified, in pertinent part, as follows:

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[2] Specifically, Thomas Builders argues that, if Mr. Patel's signature was a counter-offer, Thomas Builders accepted it by performance; that, if Mr. Patel's signature was an acceptance in escrow, Mr. Patel cannot benefit from the failure of the conditions because he himself prevented the conditions from occurring; that the purported contract contained all the essential terms, and thus the court erred in declaring it unenforceable; and that Thomas Builders did indeed prove damages.

[3] The written proposal itself, which states that it is "valid for thirty calendar days," may have been an offer. However, the facts, as found by the trial court, indicate that Mr. Patel signed the proposal only in response to Mr. Thomas's exhortations that he do so to "indicate that [he] was serious," so that Mr. Thomas could prove Mr. Patel's "seriousness" to his business partners. Thus, on these facts, Mr. Patel *was not responding to an offer* when he signed the proposal. This rules out the counter-offer and acceptance in escrow theories. If the written proposal was *initially* intended by Mr. Thomas to be an offer, it expired by its terms after 30 days, having never been accepted, rejected, or otherwise responded to as an offer.

Q. Did you view the proposal that you had received from Thomas Builders as a contract?

A. Definitely, definitely not. Nowhere close to a contract.

Q. Well, tell the court how you did view the proposal when you received it.

A. . . . I have had at least six other contractors give me similar proposals . . . I just thought it was just a study of what we can build the hotel for.

But it was simply a proposal. Very similar to other proposals that I have had from other places, companies.

* * *

Q. Did anyone from plaintiff ever indicate to you in any way that the proposal you had received, that they deemed it to be a contract?

A. 100 percent no. No one had ever implied this is going to be a contract.

Q. Were there any discussions held between you and anyone from Thomas Builders at any point that used the terms "contract" or "agreement"?

A. Definitely not.

Q. Did you ever hear those words come from anyone from Thomas Builders?

A. Definitely not.

Q. Let's talk about this telephone conversation . . . that occurred between you and Darrell Thomas after you received plaintiff's revised proposal on or about April 21, 2003. Do you recall that telephone conversation?

A. Yes, sir.

Q. Tell the court what you remember about that conversation.

A. Sure. Did you receive it? Yes. How did it look? I'm sure I would have said, oh, looks great. And, you know, I said, but we still

don't have any construction drawings. I'm not sure what his answer to that one was.

But somewhere in the conversation was, well, *I need you to at least sign it saying you have accepted it so we can further discussions, continue further discussions*. And I said normally I don't do that. He said, well, I really need to. I said, Darrell, I really can't. But then he said either his brother or other partners within the company had to have *some sort of indication that I am really serious to continue discussions*. And I said, Darrell, I really can't do that. He kept on saying that. *I said, okay, I can do that, but remember, this is for discussion purposes only* and that, you know, we – there is other land that we would have to purchase, the bank would have to approve the contract, approve you guys, that type of thing.

And I – so I went ahead and signed it as such.

Q. Was there any mention during that telephone conversation of that proposal or your signing that proposal being the final contract?

A. No, nothing whatsoever. Because, once again, I mean, I – we had said there is no construction drawings or anything to even come close to that.

Q. Was there any mention by anyone from Mr. Thomas that, Mr. Patel, when you sign it, we have an agreement?

A. Definitely not.

Q. When you heard Mr. Thomas asking you to do that, what did you think he was wanting you to do?

A. Simply sign it saying, you know, for discussion. I mean, at least my part was it is for discussion purposes only. But *to further discussion with the company, you need to sign something showing that you really are serious wanting to talk to us*.

Q. At any point in time, did you believe that signing the proposal meant there was a contract pursuant to which [plaintiff][4] was going to be your general contractor on that project?

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[4] The transcript contains the words "claim was" rather than "plaintiff." We presume this was a transcription error, as the word "plaintiff" makes much more sense in context, and sounds somewhat similar to the phrase "claim was."

A. No where close.

Q. What did you think it meant?

A. What, the signing part?

Q. The signing part.

A. Simply we want to continue discussions.

One thing I left out was the fact in the phone call he did mention that there was another hotel project they were looking at and that we would like to do yours [instead]. When he said that, I said, look, Darrell, we're definitely way far away from being in a position to build a hotel based on a 6-story design. Construction drawings aren't there. More importantly, land is not there. Without the land, this is all a moot point.

But he said, well, you know, *to just keep on discussing with us or considering, I need you to sign that you want to talk to us*.

Q. You ultimately signed the proposal and faxed the last page back to plaintiff, correct?

A. Correct.

Q. Now, when you signed, did you intend to bind yourself or the LLC to having plaintiff serve as the general contractor?

A. Definitely not.

Q. Did you believe you were binding Thomas Builders to build the hotel?

A. Definitely not.

(Emphasis added.) Mr. Patel further testified that, in his conversations with Mr. Thomas during the weeks following the signing of the proposal, Mr. Patel would discuss the various obstacles to going forward with any construction plan, and Mr. Thomas "kept on using the phrase real politely, 'Well, keep us in mind.' That was his quote, 'Keep us in mind.' He said that several times during the calls." According to Mr. Patel's testimony, Mr. Thomas never stated during those conversations that he believed the parties had a contract.

The crux of Mr. Patel's account is, as the trial court noted, "without specific rebuttal." In his testimony, Mr. Thomas never explicitly contradicted Mr. Patel's claim that Mr. Thomas induced him

to sign the proposal by telling him that his signature would mean only that he was "really serious to continue discussions." Mr. Thomas did testify that he "thought" Thomas Builders had a contract with Mr. Patel, and that he later told a supplier, "It's our job." He said he believed it's "just a given [that when we] get a signed proposal, it's our job." Yet Mr. Thomas was never asked, and did not say, whether or not he represented to Mr. Patel that a signature on the proposal would be for "discussion purposes only."

Thomas Builders' argument relies in significant part on the simple fact that Mr. Patel wrote the word "accepted" next to his signature on the proposal. Thomas Builders asks us to declare that this terminology necessarily means that Mr. Patel was pledging to "accept" the proposal and thus form a contract with Thomas Builders. When asked about this issue at trial, however, Mr. Patel reiterated his testimony that Mr. Thomas induced him to write what he wrote:

> Q. Back to the proposal you signed. And I'm confident the court will ask this question so I am going to ask it first. Why in the world did you write the word "accepted"?
>
> A. Sure. As I said earlier, I definitely did not want to use that word or even write that word or even sign anything. But, once again, Darrell was real adamant that I need to show – it was either the partner or to the brother – that you really seriously want us to consider this job and want to continue further discussions. I mean, I'm a young person. Obviously I'm – I'm naive because I did what I did, but I should not have. But I definitely was interested to continue discussions with them. And he said, you know, you definitely need to show some sign that you do want to talk. And so I did that.

Again, there is no testimony from Mr. Thomas directly contradicting this account of what transpired in his conversation with Mr. Patel.

The parties focus heavily on the question of whether Thomas Builders gave up a potential job in North Carolina on the belief that it had secured the Knoxville job with Mr. Patel – and, if so, whether this action, and Mr. Patel's knowledge of it, implies that a binding contract was formed. Mr. Thomas testified that he told Mr. Patel he would let the North Carolina job "pass on by" if Mr. Patel would sign the Knoxville proposal. He stated in part:

> Q. I want to turn your attention back to the proposal that was made and specifically the phone call that took place between you and Mr. Patel. . . . [I]t's your contention that you told Mr. Patel that you had another job in North Carolina that you were confident you could get, but you didn't want that job and you instead wanted to do his project; is that right, something to this effect?

> A. I told him that I didn't want to do both jobs, that I would rather do his.
>
> Q. And I guess you told him that if he would sign the proposal, you would pass on the North Carolina job?
>
> A. Yes. I told him I would let that job pass by.

As noted in the lengthy excerpt of Mr. Patel's testimony quoted earlier, Mr. Patel acknowledged that the North Carolina job was discussed. However, he claims that, when Mr. Thomas mentioned that he would rather do the Knoxville job than the North Carolina job, Mr. Patel emphasized the obstacles and delays that the Knoxville project would be likely to face:

> When he said that, I said, look, Darrell, we're definitely way far away from being in a position to build a hotel based on a 6-story design. Construction drawings aren't there. More importantly, land is not there. Without the land, this is all a moot point.
>
> But he said, well, you know, *to just keep on discussing with us or considering, I need you to sign that you want to talk to us*.

(Emphasis added.) In its brief, Thomas Builders argues that this account "does not make sense." It writes: "When considering the reasonableness from the standpoint of Thomas Builders, why would a seasoned contractor let go of another project on the promise by Mr. Patel that he would continue discussions . . . ?" Yet, again, Thomas Builders points to no evidence specifically contradicting Mr. Patel's sworn statement that, after the North Carolina job was discussed, Mr. Patel reminded Mr. Thomas of the lack of finality surrounding the Knoxville job, and Mr. Thomas responded by stating again that he needed Mr. Patel's signature "to just keep on discussing with us or considering."

As noted earlier, the trial court accepted Mr. Patel's testimony, stating that it "believes Mr. Patel's version that Mr. Thomas knew that Mr. Patel did not intend to be bound by a contract via his signing the proposal." This is a classic credibility determination. "The trial court is uniquely positioned to observe the manner and demeanor of witnesses," and to make credibility determinations therefrom. ***Fell v. Rambo***, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). Thus, "appellate courts accord particular deference to trial court findings that depend upon weighing the value or credibility of competing oral testimony." ***Id.*** The trial court's finding that it "believes Mr. Patel's version" is just such a finding.

Thomas Builders attempts to overcome this strong presumption of correctness by repeatedly arguing that Mr. Patel's account, accepted by the trial court, is irrational. "Mr. Patel's position doesn't even pass the 'common sense' test," Thomas Builders asserts in its brief. "[W]hy would Thomas Builders need a signature in order to continue discussions?" Later, Thomas Builders opines, "It's amazing that Mr. Patel asserted [this] position in court and it is beyond comprehension that a court could buy into it." Our review of the record demonstrates otherwise, however. It is surely not "beyond comprehension" that a trial court would believe a witness's unrebutted testimony. Whether

that testimony would, if true, indicate that one or both parties engaged in an irrational business practice, is ultimately beside the point. Reasonable minds may differ on what business practices "make sense," and, in any case, businesses and businesspeople sometimes make irrational choices – but those are not the issues before this court. Our task is to review the *evidence in this record* and ascertain whether it preponderates against the trial court's findings. Thomas Builders' appeal to abstract logic is therefore of little utility. It is the facts of this case that matter, and Thomas Builders has not pointed to any facts that directly contradict Mr. Patel's account. Moreover, in stating that "[i]n reconciling this testimony, one should determine which position makes sense and which does not," Thomas Builders ignores the significance of the trial court's credibility determination. In truth, the job of "reconciling . . . testimony" is first and foremost the province of the trial court. Nothing in this record even begins to suggest that we should disturb the court's finding that Mr. Patel's account was the more creditable one.

Thomas Builders also argues that we should give little, if any, weight to Mr. Patel's testimony about the circumstances surrounding his signing of the proposal because his account "contradicts the plain meaning of the language" on the document – *i.e.*, Mr. Patel's use of the word "accepted." Thus, according to Thomas Builders' brief, "[a]lthough the parol evidence rule was not asserted at the trial level . . . the *intent* of the parol evidence rule should apply." (Emphasis added.) "Had a seasoned objection been made as to the admissibility of Mr. Patel's testimony, it would probably have been granted," Thomas Builders asserts. The lack of such an objection, we are told, "does not absolve this Court of the duty to look to the *principles behind* the . . . rule." (Emphasis added.) No authority is cited for this proposition, however, and it would seem to rather plainly contradict the well-settled rule that evidentiary objections not raised below are waived, "intent" and all. *See* Tenn. R. App. P. 36(a); ***Simpson v. Frontier Community Credit Union***, 810 S.W.2d 147, 153 (Tenn. 1991) ("issues not raised in the trial court cannot be raised for the first time on appeal"). Nor, in any event, do we accept at face value Thomas Builders' assertion that a hypothetical parol evidence objection would have been granted. "[T]he parol evidence rule does not prohibit the court from considering the circumstances surrounding the formation of the contract." ***PDQ Disposal, Inc. v. Metropolitan Government of Nashville-Davidson County***, No. M2007-01289-COA-R3-CV, 2008 WL 1744566, at *5 (Tenn. Ct. App. M.S., filed April 15, 2008). *See also* ***Coble Systems, Inc. v. Gifford Co.***, 627 S.W.2d 359, 362 (Tenn. Ct. App. 1981). The dispute in this case is not over the terms of the "contract," but over whether a contract was formed at all, and we do not believe Mr. Patel's scribbling of the word "accepted" necessarily speaks for itself in that regard. For both of these reasons, Thomas Builders' argument that we should contravene the trial court's credibility determination and devalue Mr. Patel's testimony on this basis is without merit.

Accordingly, we hold that the evidence does not preponderate against the trial court's factual finding that Mr. Thomas induced Mr. Patel to sign the proposal "for discussion purposes only." Based on these facts, we find that no contract was formed. Thomas Builders' breach of contract claim therefore must fail.

Thomas Builders also attempts to assert a claim for estoppel, but it merits little discussion. First, this claim was not raised below, and thus it is waived. Second, even if we were to find that it was tried by implied consent, the court's factual findings clearly do not support an estoppel claim.

The court found – and we have just affirmed – that "Thomas Builders[] *had reason to know that there was no contract*, that Mr. Patel had no intent to be bound by a contract" because "Mr. Thomas induced Mr. Patel's signature with the understanding that Mr. Patel's signature would only indicate that Mr. Patel was serious about continuing discussions." (Emphasis added.) On these facts, it would be impossible to conclude that Thomas Builders *justifiably relied* on the purported contract, which it "had reason to know" did not exist. Moreover, the trial court found that there was no evidence of detriment to Thomas Builders caused by its purported reliance. Our review of the record indicates that the evidence does not preponderate against this finding. For all of these reasons, the estoppel claim is also without merit.

The judgment of the trial court is affirmed. Costs on appeal are taxed to the appellant, Thomas Builders, Inc. This case is remanded to the trial court for collection of costs assessed below, pursuant to applicable law.

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CHARLES D. SUSANO, JR., JUDGE